

# EXHIBIT D

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Lead Case Nos. 08-13555-JMP and 08-01420-JMP (SIPA)

Adversary Case No. 1-09-01482

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In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., et al.

Debtors.

-----x

In the Matter of:

LEHMAN BROTHER INC.

Debtor.

-----x

CYNTHIA SWABSON, et al.,

Plaintiffs,

-against-

LEHMAN BROTHERS HOLDINGS INC.,

Defendant.

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(CONTINUED ON NEXT PAGE)

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2 HEARING re Motion Filed by Merrill Lynch International for  
3 Relief from the Automatic Stay.

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5 HEARING re Motion Filed by the California Public Employees  
6 Retirement System for Relief from the Automatic Stay.

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8 HEARING re Pre-Trial Conference and Motion Filed by the  
9 Defendant to Dismiss.

10

11 HEARING re Motion Filed by the California Public Employees  
12 Retirement System for Relief from the Automatic Stay to Effect  
13 Setoff Against LBI Funds Currently Held by Securities Finance  
14 Trust Company.

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Transcribed by: Pnina Eilberg

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**MICHAIL ZEKYRGIAS, Interested Party**

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25

1 THE COURT: Is there more for this?

2 (No response)

3 THE COURT: Okay. We have one more matter. I'm going  
4 to take a ten minute break and resume at 3:30. Anyone who  
5 wishes to be excused, obviously is free to leave. Anyone who  
6 wishes to stay for the proceedings at 3:30, you're welcome to  
7 stay. I'll see you at 3:30. We'll take a ten minute break.

8 (Recess from 3:19 p.m. until 3:34 p.m.)

9 THE COURT: Be seated, please.

10 MR. O'NEILL: Good afternoon, Your Honor. Brad  
11 O'Neill of Kramer Levin, special counsel to the debtors.

12 We're here this afternoon on a motion to dismiss this  
13 adversary proceeding. Your Honor has seen this fact pattern  
14 before, although it arose in a somewhat different procedural  
15 context. And the motion has both substantive and procedural  
16 dimensions, with your indulgence I'd like to start with the  
17 substantive side because I think it simplifies the procedure.

18 The facts, as alleged in the complaint, are as  
19 follows. The plaintiffs were employees of Lehman who were  
20 terminated early in September of 2008. The week before the  
21 petition date they were given forms of separation agreement,  
22 which they signed before the petition date.

23 The terms of the separation agreement provide a --  
24 contain a complete release of all claims arising from the  
25 plaintiffs' employment, including all claims arising under the

1 severance policy of Lehman. In return for that release, among  
2 other things, the separation agreement provides each of the  
3 plaintiffs with a fixed stream of payments payable in two-week  
4 intervals over varying periods of time for each employee. For  
5 one I think it's six months and for the other it's in excess of  
6 a year.

7 On the substantive side, the plaintiffs have filed  
8 this adversary proceeding seeking, A, a declaration that they  
9 are entitled to both administrative claims and/or priority  
10 claims in respect of amounts due but unpaid under the  
11 agreement -- I left something out. The initial payment was  
12 made under these agreements, the initial payment was made, I  
13 think, two days after the petition date. Thereafter, the  
14 debtors sent notice to each of the plaintiffs that they would  
15 not be making further payments. And the claims have, in fact,  
16 been scheduled for each of these plaintiffs.

17 The plaintiffs seek a declaratory judgment that the  
18 claims to which they're entitled are in fact administrative  
19 claims or, in the alternative, priority claims.

20 THE COURT: Let me follow up on something you said a  
21 moment ago. Is it the case that the debtors' schedules  
22 schedule claims for unpaid compensation pursuant to the  
23 severance agreements as to all of the plaintiffs that are in  
24 the punitive class that these nominal plaintiffs would seek to  
25 represent in the adversary proceeding?

1 MR. O'NEILL: I believe -- I don't know the answer  
2 with certainty but I believe the answer to be yes.

3 THE COURT: Okay.

4 MR. O'NEILL: The -- and secondarily they assert a  
5 claim for breach of these separation agreements.

6 First with respect to the claim for administrative  
7 priority. The typical standard or the applicable standard for  
8 the allowance of an administrative claim requires a transaction  
9 with the estates, not with the prepetition debtor. And it  
10 requires that the transaction or administrative claim is only  
11 allowed to the extent there is actually benefit to the estate.  
12 Here it's clear that the, and I don't think there's any  
13 dispute, that the contract on which these claims are based is a  
14 prepetition claim made with the prepetition debtor. And I  
15 don't think there's even any dispute about whether or not there  
16 was benefit conferred on the estate. There isn't an allegation  
17 in the complaint that there was benefit and I don't think that,  
18 I could be wrong but I don't think you're going to hear that  
19 these employees who did not work for even a single day for the  
20 debtors postpetition, conferred benefit on the estate.

21 The theory, rather, is strictly Straus-Duparquet. And  
22 the argument, as I understand it is, Straus-Duparquet says that  
23 an employee who is terminated postpetition becomes entitled to  
24 -- and is entitled to severance -- his right to severance is  
25 deemed to accrue at the time of termination as compensation for

1       hardship. These employees, it is asserted, were terminated  
2       postpetition because under nonbankruptcy employment law they  
3       are considered employed until their salary payments cease. So  
4       in other words, you're an employee until the day you stop  
5       getting salary, thereafter you stop being an employee therefore  
6       that's the date of your termination.

7           Under the terms of the separation agreements, the  
8       payments were supposed to continue into the postpetition  
9       period. They did continue briefly but then they stopped almost  
10       immediately after the petition.

11           I think the simple response is, this case isn't  
12       Straus-Duparquet. This is not a case in which these plaintiffs  
13       had a right to a payment upon termination. While they may, at  
14       one point prepetition, have had rights under a severance  
15       policy, they surrendered those rights when they signed the  
16       separation agreements.

17           Under the separation agreements, they do not have a  
18       right to payment upon termination; they have simply a right to  
19       a fixed schedule of payments. So any right they have is  
20       founded exclusively on that agreement and it is a prepetition  
21       agreement and therefore a prepetition claim. And I think, in  
22       fact, the underlying theory of the plaintiff's argument here,  
23       which is that we're not terminated until you stop paying us, it  
24       doesn't make sense on its own terms because under their theory  
25       they're not terminated until no further payments are do. And

1 so in other words, you pay me everything I'm owed and then I'm  
2 terminated.

3 So if that's right, I don't think it is but if it is,  
4 when you're terminated there's nothing else due and you're not  
5 entitled to severance. So it doesn't -- the theory, I think,  
6 doesn't hold water on its own terms. It also doesn't hold  
7 water under Straus-Duparquet or under basic bankruptcy law.  
8 And in fact, Your Honor has considered, as I've said before,  
9 you've considered this fact pattern before.

10 Marie Hunter, who was another employee terminated in  
11 the same reduction in force, filed a motion for payment of an  
12 administrative expense back in the fall making essentially the  
13 same arguments. There were some minor variations but it's  
14 essentially the same argument. And Your Honor concluded that  
15 the fact that the contract was entered into prepetition was  
16 determinative and entered an order specifically denying her  
17 claim for an administrative expense to the extent that it was  
18 premised upon Straus-Duparquet. You did allow her to -- it was  
19 without prejudice to her ability to come back and demonstrate  
20 that she conferred benefit on the estate; she had actually  
21 worked for the estate postpetition.

22 Now on to the procedural side of things. The  
23 plaintiffs are asserting essentially prepetition claims. They  
24 have filed proofs of claim, which in our view is the  
25 appropriate procedure to follow. But they've also commenced an

1 adversary proceeding, which in our view is not the appropriate  
2 procedure to follow. We have cited Your Honor to a series of  
3 cases which support that. The proper procedure to follow is to  
4 file proofs of claim, it gives the -- those claims are deemed  
5 allowed immediately so that there is no need to have litigation  
6 if the debtor does not dispute the claims. And it also  
7 provides for a more orderly administration of the claims  
8 process. In a large case such as this one, if every claimant  
9 was allowed to push to the front of the line by filing an  
10 adversary proceeding, we would have chaos.

11 The response to that is that is presented by the  
12 debtors is -- by the plaintiffs, excuse me, is that Rule 7001  
13 contemplates that a motion or an action to recover money or  
14 property is properly styled as an adversary proceeding. While  
15 that is an accurate quotation of the rule, the Rule 7001  
16 adversary proceeding is expressly not intended to displace the  
17 proof of claim process. It's instead intended to allow the  
18 debtor to assert claims for money or property or to allow  
19 creditors to assert claims to specific items of property in the  
20 possession of the estate. It's not intended to provide an  
21 alternative avenue to assert prepetition claims or the district  
22 claims.

23 In fact, when you look at the advisory notes they're  
24 very clear that proofs of claim only become adversary  
25 proceedings A, once they're objected to and B, if the trustee

1 or the debtor objecting to them actually seeks relief of the  
2 type specified in Rule 7001.

3 Finally, the plaintiffs seek to style this as a class  
4 action. And there is well developed case law in this district  
5 that says in an adversary proceeding perhaps, or an adversary  
6 proceeding Rule 7023 applies. It does not, however, apply  
7 under -- in a contested matter under Rule 9014 unless Your  
8 Honor, in your discretion, decides it should. And there are no  
9 fewer than four cases decided in this district over the last  
10 decade or so which lay out standards which may guide your  
11 exercise of discretion and they particularly specify three  
12 factors which you should consider. The first of which is has  
13 the movant sought authority to proceed on the class basis.  
14 It's true that this issue comes up primarily in the context of  
15 proofs of claim but it is applicable, I think -- there's no  
16 basis to limit it to that.

17 There's no argument, I think, here that the plaintiffs  
18 have not sought that authority. Also, under the relevant cases  
19 there are fairly limited circumstances in which courts have  
20 exercised their discretion to allow class actions, in  
21 particular cases where a class has been certified prepetition  
22 or where there's some showing that notice is inadequate. Here,  
23 clearly there isn't a prepetition class but also there's no  
24 issue of notice.

25 The former employees, going back three years, were

1 provided with notice of the case. This matter, presumably, was  
2 fresh in everybody's mind at the time of the filing. And in  
3 fact, well over a hundred people have filed proofs of claim  
4 asserting claims in respect of these separation agreements. So  
5 I think there's no argument that notice was adequate, however  
6 that does take us to the next issue which is, is a class action  
7 consistent with the policies of bankruptcy, which are to  
8 centralize claims, to achieve a just, orderly, economic and  
9 expeditious resolution of claims. And I think here we would  
10 argue that the answer is no. There has been ample notice to  
11 the class, the punitive class. Many members of that class have  
12 taken advantage of the opportunity to file proofs of claim;  
13 those claims are, for present purposes, allowed. And there's  
14 no need to have anyone represent the interests of people who  
15 have not expressed an interest in being represented for what  
16 may be entirely unnecessary.

17 THE COURT: Let me break in on something you said.  
18 You said these claims are, for present purposes, allowed?

19 MR. O'NEILL: Proofs of claim are deemed allowed until  
20 they're objected to.

21 THE COURT: All right. But for purposes of the motion  
22 to dismiss, there are certain claims that have been scheduled,  
23 certain claims that are the subject of a proof of claim and at  
24 the moment at least, I'm not clear as to whether members of  
25 this punitive class are within the category of proofs of claim

1 filed or schedule claims or both.

2 MR. O'NEILL: Both.

3 THE COURT: So there are some members of the class  
4 that have claims that have been scheduled but have not filed  
5 proofs of claim, is that right?

6 MR. O'NEILL: I believe the number is around 150, Your  
7 Honor.

8 THE COURT: A hundred and fifty that have been  
9 scheduled?

10 MR. O'NEILL: Scheduled but no proof of claim.

11 THE COURT: And as to the scheduling of these claims,  
12 are they scheduled as prepetition unsecured claims?

13 MR. O'NEILL: Yes.

14 THE COURT: And as to the proofs of claim that have  
15 been filed, are they claims that have been filed for priority  
16 status, for administrative status and unsecured status or are  
17 they, sort of, all over the lot?

18 MR. O'NEILL: I think there is some variation in them.  
19 I'm not going to tell you I've reviewed every one. I would say  
20 the majority of them assert priority status.

21 THE COURT: All right. Go ahead.

22 MR. O'NEILL: And that raises an additional point,  
23 which is that to the extent a class action is certified, class  
24 actions are opt out as opposed to bankruptcy which is really  
25 opt in. And to the extent that one were to permit -- certify

1 an opt out class and permit people who have not filed proofs of  
2 claim to opt in, they would essentially be getting a second  
3 bite at the bar date. And that raises due process concerns, I  
4 think, for those who actually did see and comply with the bar  
5 date.

6 The only -- and then finally, before exercising  
7 discretion to allow a class action to proceed in a contested  
8 matter, courts have required a showing that the plaintiff  
9 comply with Rule 23 and have conducted analyses of the various  
10 Rule 23 factors.

11 We have outlined our position on those factors in our  
12 papers. There really has been no response in the plaintiff's  
13 papers. To be brief, we argued that you can't show superiority  
14 because basically bankruptcy's different. Bankruptcy does most  
15 of the things a class action is supposed to do. And  
16 introducing the class action concept compromises bankruptcy in  
17 some way by adding an additional layer of procedural  
18 complexity, adding cost and monkeying around with the bar date.

19 We also pointed out that they will have trouble  
20 showing luminosity because this class, the punitive class, is  
21 not large by class standards. In fact, we've cited cases  
22 showing -- refusing to certify classes, punitive classes that  
23 were much larger on this ground. And also because the class  
24 members are geographically not disbursed, undisbursed. They're  
25 located in the tri-state area, overwhelming. Not exclusively

1 but overwhelmingly. And those -- that factor is directly  
2 relevant to the class action analysis. Plus, there are also  
3 individual issues such as are people insiders and does that  
4 render these agreements avoidable under the modifications to  
5 Section 548(a). There are provisions in the CFR relating to  
6 golden parachute payments, all of which are individual not  
7 class specific.

8 And in addition, the primary rationale that I think  
9 you're offered to certify a class -- why a class is appropriate  
10 here is because there are asserted to be common legal issues  
11 and the Court can efficiently resolve common legal issues in  
12 the context of a class action. And while that's true as far as  
13 it goes, I'm not sure it justifies having a class action here  
14 because, frankly, everything's centralized in front of you  
15 already. And as you pointed out in the proceeding before the  
16 break, your decisions are law of the case and anything you do  
17 in this case -- if you were to do it in an individual matter  
18 it's going to be generally applicable to the other people who  
19 are in the same situation.

20 So you don't need a class action in order to have  
21 uniformity of decisions. You're not going to have a conflict  
22 in decisions. There's only one decision maker and we know  
23 enough, once you've ruled, not to bring the same thing back to  
24 you again and again.

25 For each of those reasons, Your Honor, the debtor

1 would argue that the complaint should be dismissed and the  
2 plaintiffs' claims for an administrative claim should be denied  
3 and they should otherwise be -- but they should otherwise be  
4 allowed to proceed on an individual basis with their proofs of  
5 claims as filed.

6 THE COURT: Let me, before you sit down; ask you the  
7 follow up on that comment about administrative claims being  
8 denied. Procedurally, this is a motion to dismiss an adversary  
9 proceeding brought by two named former employees purportedly on  
10 behalf all similarly situated employees seeking a determination  
11 that all members of the class are entitled to administrative  
12 claim status.

13 Is it your position that if I were to grant your  
14 motion to dismiss and relegate the individual members of this  
15 class to managing their claims through the individual proof of  
16 claim process, that there is any preclusive impact upon their  
17 ability, if they've already filed an appropriate claim for  
18 administrative claims status, to later prosecute that claim as  
19 an administrative claim. Or for that matter, to the extent  
20 that there is no administrative bar date yet set, does there --  
21 is there anything about granting the motion to dismiss that  
22 would preclude members of this purported class from  
23 individually filing, prior to an administrative bar date, an  
24 administrative claim.

25 MR. O'NEILL: I do not believe that until the class is

1 certified that the non-named plaintiffs -- in other words, the  
2 punitive class members how aren't named plaintiffs are parties  
3 to the proceeding and so therefore I don't believe they are  
4 bound by your ruling. I think the only parties who are bound  
5 are the plaintiffs -- the individual plaintiffs themselves.

6 THE COURT: I understand that but I was really  
7 focused, perhaps myopically, on the comment you made about  
8 ordering that members of this class would not have  
9 administrative claims status if I were to grant your motion to  
10 dismiss. I don't think that's right and I'm not sure --

11 MR. O'NEILL: If that is what I said --

12 THE COURT: -- that's what you're asking for.

13 MR. O'NEILL: It is not what I'm asking for. If it's  
14 what I said, I misspoke. To the extent that I'm asking you to  
15 deny a request for an administrative expense claim, it is only  
16 as it relates to these two named plaintiffs. I do not -- I'm  
17 not attempting to foreclose anyone else from coming in, I don't  
18 think you can at this point. If they want to come in and  
19 assert a motion for an administrative claim, I don't think --  
20 I'm not asking you to preclude them, I'm not sure you can.

21 THE COURT: Well, I'm not sure that -- I'll hear from  
22 the plaintiffs on this, it's a small point. But if I were to  
23 determine that the procedural choices made by these plaintiffs  
24 are inappropriate and that claim allowance is a matter not to  
25 be handled by means of adversary proceeding but by other means

1       during the course of the case, including, to the extent  
2       appropriate, the filing of administrative claims assuming such  
3       claims are still viable, it seems to me that even if I were to  
4       dismiss their complaint it would be without prejudice to their  
5       ability to at least attempt to assert administrative claims  
6       status unless it's your position that the granting of your  
7       motion to dismiss requires a determination as to the  
8       applicability of Straus-Duparquet to these claims. Because  
9       you've made both a procedural and a substantive argument, I  
10      believe that I would only be precluding these individual  
11      plaintiffs from asserting an administrative claim if I were to  
12      grant the motion on the basis of Straus-Duparque as opposed to  
13      granting the motion on a purely procedural basis.

14            MR. O'NEILL: I agree with that. If I understood Your  
15      Honor properly, your question was if you grant it on just the  
16      procedural basis would they be precluded and I think the answer  
17      to that is no.

18            THE COURT: Okay. Thank you.

19            MR. RAISNER: Good afternoon, Your Honor. Jack  
20      Raisner on behalf of the plaintiffs.

21            The piece that's missing from Mr. O'Neill's  
22      presentation, Your Honor, is what makes for this adversary to  
23      be appropriate and for this type of claim in the adversary to  
24      be appropriate. And the piece that's missing is that we're  
25      talking about compensation for employees who have lost their

1       jobs. In the vast panoply of claims that come before Your  
2       Honor, there's a special status that's been accorded because of  
3       concerns over the welfare of employees who lose their job, both  
4       in bankruptcy, in the Code, in the Second Circuit decisions and  
5       in the general law in our society. If a person loses their job  
6       they can go to the Unemployment Bureau to get money  
7       immediately.

8                   The Second Circuit, in Straus-Duparquet, obviously has  
9       accorded a special status as an administrative claim for  
10       certain severance claims. The Bankruptcy Code, in 2005 was  
11       amended by Congress to add to Section 503(b)(1)(A)(ii) a back  
12       pay claim for employees whose pay has stopped wrongfully. And  
13       their back pay claim, if it is contemporaneous with the  
14       postpetition period, they have an administrative claim for that  
15       back pay.

16                   THE COURT: But one of the problems you have though,  
17       is that these employees entered into prepetition severance  
18       agreements. And the claims that they have, as I understand it,  
19       arise out of agreements that were entered into on September 12,  
20       the Friday before the Monday filing of LBHI. And as noted by  
21       counsel, I'm familiar with the issue and dealt with it at least  
22       in another setting a couple of months ago when Ms. Hunter,  
23       through counsel, raised the same Straus-Duparquet argument and  
24       obviously it was a different procedural setting but the law's  
25       the same. I found that there was no basis for claiming, under

1 that severance agreement, that there was a right to a  
2 postpetition administrative claim. I also distinguished the  
3 prepetition agreement from the collective bargaining agreement  
4 that was applicable in the Straus-Duparquet situation because  
5 there the employees were terminated postpetition.

6 I also noted, during the course of that argument and  
7 colloquy, that as a matter of bankruptcy planning very  
8 frequently parties contemplating a bankruptcy in the Second  
9 Circuit will rather self-consciously and deliberately enter  
10 into severance arrangements with their employees in a reduction  
11 of force prebankruptcy so as to avoid the impact of Straus-  
12 Duparquet and the creation of administrative expense liability.

13 That being the case, how, if at all, do you  
14 distinguish the plaintiffs in your adversary proceeding from  
15 the situation that I've already addressed, recognizing, as has  
16 been mentioned by counsel, that I'm the same judge who heard  
17 that last one and unless you can distinguish this situation  
18 from that you're not likely to prevail.

19 MR. RAISNER: Your Honor, I had a chance to look at  
20 the transcript of the hearing in the Hunter matter and read it  
21 very carefully. I was surprised because, with all due respect  
22 Your Honor, you took the position that you did believe that  
23 Straus-Duparquet stands for the proposition that the only  
24 instance in which there'll be administrative claim is when the  
25 claimant has made an agreement postpetition with the debtor in

1 possession. And Straus-Duparquet is not ambiguous on that  
2 point, Your Honor. The case says very clearly that the  
3 collective bargaining agreement was with the debtor. The  
4 termination was by the debtor in possession.

5 THE COURT: Postpetition.

6 MR. RAISNER: The termination was postpetition.

7 THE COURT: Termination was postpetition.

8 MR. RAISNER: But the underlying severance policy, the  
9 plan, was a contract with the debtor prepetition.

10 THE COURT: But in this circumstance --

11 MR. RAISNER: Yes.

12 THE COURT: -- the severance agreements were entered  
13 into prepetition and the employment relationship was terminated  
14 prepetition.

15 MR. RAISNER: That, Your Honor, is a question of fact.  
16 The agreement said the separation would only occur months  
17 later. The employees were carried on the payroll as employees  
18 with their salary on payroll, with their benefits completely  
19 unaffected.

20 For Your Honor to say that as a matter of fact  
21 conclusively state that the termination took place when the  
22 debtor says it took place is putting the facts in the best  
23 light for the debtor but there's a dispute, as Mr. O'Neill  
24 said. Employment law generally doesn't look to when you agree  
25 to a termination, it's when things happen down the road that

1 affect the termination. And here there is a spectrum of  
2 events, and I appreciate Your Honor's point about planning,  
3 that these are carefully designed. That they were designed to  
4 continue the employee through something called a notice period,  
5 through something called a separate period after that, for a  
6 long period of time when they are on the books as employees and  
7 from my experience, Your Honor, if employers during that period  
8 can take advantage of saying that the termination takes place  
9 at some later point, they will do that.

10 For instance, in this case, the separation first  
11 starts in September but I bet if there was some government  
12 program that gave the employer a kickback or a return on some  
13 tax rebates if termination is set to take place in January of  
14 the following year, they could show to the government yes this  
15 was still an employee of ours in January of the following year.  
16 Look, he's got all -- he's been on the books, we can take  
17 advantage of some other -- for some other purpose that's  
18 advantageous to us.

19 I think this deliberate ambiguity in these continued  
20 relationships, sometimes called guard and leave where the  
21 person is, sort of, half in and half out, I think that's why  
22 there's an issue of fact for a little discovery Your Honor  
23 before we can say that the termination took place prior to the  
24 filing of the bankruptcy. Because there are theories, there's  
25 law, good law on, saying that the termination hasn't taken

1 place until certain things happen. We think that this stopping  
2 of payment, cutting off the compensation, is more an event of  
3 severance than anything else that took place until then. And  
4 that certainly took place postpetition, there's no question  
5 about that.

6 THE COURT: Is there any factual dispute as to the  
7 members of your class, your punitive class, that all of these  
8 individuals did no work for the debtor postpetition?

9 MR. RAISNER: We have -- we don't know all of the  
10 class members' identity. We've been approached by and have  
11 spoken to 150 or so. There are individuals among them who did  
12 provide services. I don't know how many but we do know of  
13 some, like Ms. Hunter.

14 Your Honor, in terms of Ms. Hunter's situation, let's  
15 be clear that she was not seeking what we're seeking. She was  
16 seeking a 160,000 dollar "special payment". That is not what I  
17 consider to be a Straus-Duparquet severance. I think Your  
18 Honor had grounds to look at that aspect of it, you could have  
19 denied the motion on that basis.

20 We are looking for those payroll payments that she  
21 wasn't even asking for for the notice period, for that eight  
22 weeks until November 8th. And try to understand, what was that  
23 if it wasn't employment. This is the issue that I don't think  
24 is actually even in conflict with your previous ruling, Your  
25 Honor.

1 THE COURT: I have a fundamental problem that you  
2 might as well address now that is somewhat comparable to the  
3 issue that I raised in a very different setting earlier today,  
4 if you were sitting through the CalPERS argument, where I was  
5 concerned about some case administration consequences of  
6 granting CalPERS relief from the automatic stay.

7 I have some similar case administration concerns with  
8 respect to the procedural approach that you have adopted here  
9 on behalf of members of this proposed class.

10 As you may or may not be aware, the claims  
11 administration process in the context of the Lehman bankruptcy  
12 cases is a massive undertaking that involves some sixty-plus  
13 thousand claims aggregating some 800 and some odd billion  
14 dollars. And based upon representations that have been made to  
15 the Court, the aggregate claims may swell, at some point, to  
16 more than a trillion dollars. And there is a very rigorous and  
17 carefully conceived claims process that has been established in  
18 this case, including the proof of claim process, process by  
19 which the debtors and their professionals are reviewing proofs  
20 of claim to determine those that may be worthy of objection and  
21 those that may be allowed. And what I don't understand is why  
22 it is appropriate for any claimants that have filed proofs of  
23 claim or that have scheduled claims to be asserting anything  
24 with respect to claim allowance in the context of an adversary  
25 proceeding. That's a real problem I have and that means it's a

1 problem you have.

2 MR. RAISNER: I admit I didn't follow the CalPERS  
3 argument all that well, Your Honor.

4 THE COURT: You don't need to have even listened to  
5 it.

6 MR. RAISNER: No, but I did hear the word piecemeal,  
7 Your Honor, and the concern about piecemeal claims assessments.  
8 Our experience, and we largely do one-action cases for the same  
9 type of back pay in bankruptcy courts around the country, our  
10 experience is that we actually are of some help to making the  
11 claims process for these types of situations more expeditious,  
12 more economical, in touch with the Court and not at odds with  
13 the Court.

14 There are, obviously, hundreds of proofs of claims  
15 that are coming through like Ms. Hunter's that are factually  
16 different in what the person has written down. They're going  
17 for one amount; we're going for different amounts. They seem,  
18 superficially, to be alike but they're very much different and  
19 many of them, as a result, have issues of proofs of fact or  
20 nuances that we think that we're in a good position to be able  
21 to sort through for the Court and can explain to people and to  
22 give an alternative to having 150 Ms. Hunters come before Your  
23 Honor and go over some issues which are the same, some of which  
24 are somewhat different. If they're not contested, Your Honor,  
25 I do step back. If the debtor's position is to allow all of

1 the proofs of claim at the levels that everyone has asked and  
2 there's no contention and there's no dispute, then I don't see  
3 the need for counsel for anybody.

4 But if there's a denial of the claim, for someone  
5 who's seeking relatively small amounts of money, at that time  
6 they've lost because we all know that they can't afford a  
7 lawyer to even ask the questions why have I been denied a  
8 priority, what can I do about it. And there's no one to step  
9 in and do that. We serve -- we see ourselves serving the  
10 Court, as officers of the Court, to be an intermediary and to  
11 make this a lot more efficient than it usually is.

12 If Your Honor's figured out a process which is much  
13 different than the traditional, ordinary bankruptcy procedures,  
14 then there is an opportunity for Your Honor, if you were to  
15 grant us status, if we're a class, we can make a motion for  
16 class certification, we can go over which is the better process  
17 and you can deny class certification. So allowing us to go the  
18 next step certainly hasn't precluded an analysis of which is  
19 the best process for these types of claims in this procedure.

20 Very often, most often, in fact almost always the  
21 debtor will stipulate to the class with us because with limited  
22 funds to hear individual people piecemeal, it's better to just  
23 have it done by one lawyer speaking who can do it for everyone  
24 and that is in concert with, I think, the Grant (ph.) case,  
25 Your Honor, where the speaking in unison for low level claims

1 for individuals who were not sophisticated, to have one lawyer  
2 able to do that for the group helps everyone's claim to come  
3 forward and not be lost in the mix and to have someone speak  
4 for them and, as I say, to actually make things easier for the  
5 Court.

6 THE COURT: Well, I appreciate your desire to ease my  
7 burden but the real issue that I'm focused on is whether, under  
8 these circumstances, it is appropriate, as a matter of  
9 bankruptcy law, for a particular class of creditors, regardless  
10 of whether they be former employees or swap counterparties, to  
11 be separately represented in an adversary proceeding that  
12 accelerates to an earlier phase of the case a claim allowance  
13 process that is well regulated, well respected, has bankruptcy  
14 rules that specifically relate to it and in this case a series  
15 of procedural orders that have been specially crafted to the  
16 needs of the case. Why would it ever be appropriate for one  
17 lawyer to purport to represent any subclass of claimants  
18 through an adversary proceeding when there already exists a set  
19 of procedures designed to deal with claim allowance?

20 MR. RAISNER: Obviously the adversary proceeding, Rule  
21 7000, is part of the Bankruptcy Code and so it does have its  
22 uses.

23 THE COURT: Yes, I have a whole docket of adversary  
24 proceedings.

25 MR. RAISNER: Right. Okay. And I appreciate the

1 concern of more than just gate keeping, that if it's us why not  
2 everybody, which is a big problem. I think, going back to my  
3 first statement Your Honor, that the claims of employees for  
4 wages, having a special status both with regard to the  
5 substance and the procedure. The 7001 speaks to enforce  
6 declaratory judgments which could be why everyone could  
7 conceivably have one. But 7001(7), equitable relief, is for  
8 types of claims that are different from the plain vanilla money  
9 claim.

10 In our case, back pay has been considered equitable by  
11 virtually all courts, from the Supreme Court down. We have  
12 benefits which was promised our individuals which are ERISA  
13 benefits. Contrary to Mr. O'Neill, they did not give up their  
14 benefits. They did not give up their severance in the releases  
15 that our people signed. They have specific employee-related  
16 equitable claims that are not going to be had by swap vendors  
17 and other counterparties.

18 So both for the use of the adversary and for class  
19 certification, we are probably the thin pin on the map that is  
20 different from the rest that others will not fit into and yet,  
21 that pin has been elevated and accorded a special status in  
22 bankruptcy law and elsewhere, which is the rationale, Your  
23 Honor, for why the making of a difference for the use of Rule  
24 23 for which, as you know, the adversary says is appropriate is  
25 good in keeping with the WT Grant line of cases of the Second

1 Circuit, that for employees this is the thing that works for  
2 them and it's part of the bankruptcy rules and it does not  
3 apply to the plain vanilla swap claimants.

4 You won't find a run on the use of adversary  
5 proceedings, Your Honor, if you say in the limited circumstance  
6 of employees with back pay, ERISA types of claims, the use of  
7 the equitable mechanism of adversary combined with a quick look  
8 to see if there is a class action or not, and perhaps to do  
9 that early rather than later so that other creditors know if  
10 there's going to be a priority claim. It makes some sense;  
11 we're not trying to get ahead of the line. Ms. Hunter came  
12 before us, there's no prejudice.

13 THE COURT: It seems to me -- I'm just going to  
14 disagree with you. You are getting ahead of the line by having  
15 filed this on behalf of the class that you purport to  
16 represent. And in talking about back pay I think you may be  
17 using a term that's inapplicable. These are claims, not for  
18 back pay but claims for payments otherwise payable pursuant to  
19 agreements entered into prior to the bankruptcy. These are  
20 payments in lieu of back pay. These are payments being made,  
21 if they're made at all, pursuant to a separate undertaking that  
22 was entered into as a prepetition contract arrangement which I  
23 believe distinguishes this from situations that you're probably  
24 referring to where parties have been -- have unpaid wages  
25 pursuant to the employment policies of a particular debtor in

1 possession, some of which may be prepetition, some of which may  
2 be postpetition and all of which are accorded the status that  
3 they're accorded under the Bankruptcy Code, some  
4 administrative, some priority, some neither.

5 So this is -- with respect to your argument, I view  
6 this as a clearly different situation. And in terms of case  
7 administration, not your adversary proceeding but the overall  
8 Lehman cases, I view it as very bad policy for anybody to be  
9 jumping the line that happens to have proofs of claim already  
10 filed.

11 MR. RAISNER: We're not seeking payment ahead of  
12 anyone. We're --

13 THE COURT: You are seeking a determination of rights  
14 under the prepetition contracts that would give rise to a right  
15 to payment. The broad definition of a claim in bankruptcy is a  
16 right to payment. This is a claim allowance adversary  
17 proceeding.

18 MR. RAISNER: The designation of the rights or the  
19 determination of the rights in the adversary, again I don't  
20 know the -- how many separate proofs of claim like Ms. Hunter's  
21 you've already heard but it seems as if it's within the period  
22 in which claims are being determined of this sort, in both the  
23 proof of claim process --

24 THE COURT: Let me assure you --

25 MR. RAISNER: Yes.

1                   THE COURT: -- I have not determined the validity of  
2 any proof of claim and don't anticipate that that will happen  
3 any time soon. We're at a very, relatively early, stage of the  
4 most complex claim administration exercise ever undertaken in  
5 any bankruptcy court anywhere.

6                   MR. RAISNER: I appreciate that, Your Honor. If there  
7 were a way to forestall the hearing of the adversary that would  
8 be in keeping with the overall schedule, I don't think it would  
9 prejudice anyone to fall into place, that's up to, it seems to  
10 me, calendar scheduling. I don't think that we have a right to  
11 insist that the adversary move at any particular speed or with  
12 any particular scheduling order. And again, if Your Honor  
13 senses that having these claims determined early is bad and not  
14 good, Your Honor certainly can order that, I think, without  
15 dismissing the adversary. If it otherwise could make sense to  
16 aggregate these claims of this group of people and take them in  
17 a group under one roof and not have a piecemeal process of  
18 having to go through them separately. We are really not trying  
19 to get ahead of the line by bringing the adversary. It's more  
20 a matter of trying to keep it economical.

21                   THE COURT: Okay. Anything more from the debtor?

22                   MR. O'NEILL: One very short point. The substance of  
23 the Straus-Duparque and that is there was some discussion about  
24 when these folks were terminated and I would suggest that it  
25 really doesn't matter when they were terminated because as soon

1 as they signed the separation agreements they no longer had a  
2 right to payment upon termination, which is all that Straus-  
3 Duparquet talks about. Once they signed the separation  
4 agreements they had a right to be paid every two weeks for a  
5 specific period, it didn't matter whether they were employed or  
6 not, they had that right to payment. It's not Straus-Duparquet  
7 where they had a right under the collective bargaining  
8 agreement, a contingent right to payment when and if you are  
9 terminated. That doesn't exist under those agreements -- under  
10 these separation agreements. And, in fact, any right they had  
11 to that sort of payment is explicitly released.

12 So I don't think that while they go to great lengths  
13 to say terminated cause -- I don't think it matters. I think  
14 these -- the separation agreements disposed of that issue and  
15 that's the only clarification we'd make.

16 THE COURT: Okay. I'm granting the debtors' motion to  
17 dismiss but it is without prejudice to the rights of the named  
18 plaintiff in the adversary proceeding and is also without  
19 prejudice to the rights of those members of the proposed class,  
20 some of whom have filed proofs of claim, some of whom may have  
21 scheduled claims and some of whom may not know the difference  
22 between an administrative and priority claim.

23 This is not a determination with respect to the merits  
24 of the legal rights of these individuals under Straus-  
25 Duparquet. This is a purely procedural ruling and I've already

1 spoken, in the course of the Hunter litigation, with respect to  
2 the application of Strauss-Duparquet to these severance  
3 agreements. But I accept the argument of plaintiff's counsel  
4 here that I do not yet have a full evidentiary record on the  
5 basis of which to make ultimate conclusions as to the rights of  
6 these individuals.

7 It appears to me, based upon the papers that I have  
8 reviewed, that Straus-Duparquet is inapplicable to these  
9 prepetition severance agreements but I am not precluding any  
10 member of the class at a later point in the case from being  
11 able to make whatever arguments can be fashioned to try to fit  
12 these agreements into a Straus-Duparquet construct. I think it  
13 will be difficult to do, if not impossible, but this ruling is  
14 not fundamentally determinative of those rights. This is  
15 simply a procedural ruling on a motion to dismiss.

16 I'm granting the motion because I'm convinced that an  
17 adversary proceeding is procedurally improper under these  
18 circumstances. Bankruptcy Rule 7001 authorizing adversary  
19 proceedings is no substitute for the filing of a proof of claim  
20 nor is it used to adjudicate the priority of a proof of claim,  
21 see Dade County School District v. Johns-Mansville, 53 B.R.  
22 346, 352 (S.D.N.Y. 1985).

23 Additionally, the advisory committee notes Rule 7001  
24 provides "Filing of proofs of claim and the allowances thereof  
25 are governed by Rules 3001 to 3005." The rules that govern and

1 are applicable to the filing, treatment, classification and  
2 objections to claims are governed by Rules 3001 to 3008. It is  
3 through these procedures that the plaintiffs can seek to have  
4 their claims adjudicated.

5 This process, particularly in the context of this  
6 bankruptcy case, promotes judicial economy and insures a  
7 fairness of distribution among all creditors. Because I find  
8 that the adversary proceeding is an inappropriate procedural  
9 means to deal with these issues of claim allowance, I also find  
10 that it is impermissible to deal with class certification  
11 issues in this setting.

12 Ordinarily, Rule 23 provisions are applied sparingly  
13 in Chapter 11 cases. The reason for that is that the  
14 bankruptcy process itself allows for a multitude of claimants  
15 to have their claims heard and determined in a single court.

16 As was stated recently in the Bally Total Fitness  
17 case, as a general matter "There is no absolute right to file a  
18 class proof of claim under the Bankruptcy Code." Under these  
19 circumstances, without prejudice to the rights of the  
20 plaintiffs, a class action is, in the Court's view, an entirely  
21 unnecessary and inappropriate procedure. And for that reason I  
22 grant the motion to dismiss.

23 To the extent that there are substantive arguments  
24 that have been made in the motion and in the argument made  
25 today by counsel for the debtors, those substantive points are

1 reserved for a future determination, if that ever happens in  
2 the context of the claim allowance process.

3 I'll accept an order consistent with this ruling.

4 MR. O'NEILL: Very well, Your Honor.

5 MR. RAISNER: Thank you, Your Honor.

6 THE COURT: We're adjourned.

7 MR. O'NEILL: Thank you, Your Honor.

8 (Proceedings Concluded at 4:29 PM)

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